83-807

No. .....

IN THE

Supreme Court of the United States

October Term 1983

Carl Michael Siebert,

Petitioner

vs.

D.T. Baptist, District Director
of Internal Revenue Service, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in holding that plaintiff, in this Constitutional tort action, was required to disprove the Defendants' claim of qualified immunity in order to survive their motion for summary judgment?

2. Did the District Court err in finding that the Anti-Injunctive Act, 26 U.S.C. § 7421(a), which precluded an earlier action by plaintiff as a case with respect to Federal taxes, did not toll the statute of limitations on plaintiff's tort claim for malicious prosecution of a bad faith termination assessment against certain Internal Revenue officials?

3. Did the District Court err in holding that Plaintiff's claim for relief under 42 U.S. C. § 1985, 1986, based on a conspiracy

between Federal and State officials, did not state a claim for relief where only violations of Federal rights were alleged?

4. Did the District Court err in refusing to consider evidence of Defendants' tax assessment procedures, as detailed in their official Internal Revenue Manuals and sworn affidavits of former agents, on the issue of whether defendants should prevail on their qualified immunity defense?

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The Court of Appeals' opinions for the Fifth Circuit are cited at 594 F.2d 923 and 599 F.2d 723 (App. A & B). The Court of Appeals for the Eleventh Circuit did not write an opinion (App. J-I), rather it simply affirmed the District Court's opinions and orders. Those opinions and orders are herein attached and appendixed at App. D-I of this petition.

JURISDICTION

The Court of Appeals' affirmation bears the date of May 27, 1983. It was entered on that day. The present petitioner, Michael Seibert, hereinafter refered to as "Seibert", did apply for rehearing which was denied on August 11, 1983. Seibert invokes the jurisdiction of this Honorable Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, rules and regulations, the relevant parts of which are set forth in Appendixes hereto:

Art. III, § 2, U.S. CONST.;

Amend. V, U.S. CONST;

Amend. VI, U.S. CONST;

Amend. VIII, U.S. CONST.;

IR Manual Supplement of May 19, 1971, Sections 1, 2, 3, 4, 6;

IR Manual Document MT 4500-129 (9-15-71) paragraphs 4584.3, 4584.4, 4584.5, 4584.6, 4584.7, 4584.8, 4585.1, 4585.2, 4585.3;

26 U.S.C. §§ 6201, 6212, 6213, 6331, 6851, 6861, 7421;

28 U.S.C. §§ 1331, 2201, 2202;

42 U.S.C. §§ 1983, 1985, 1986;

Fed. R. Civ. P. Rules 26, 33, 34, 56.

NO. _____

IN THE

OCTOBER TERM, 1983

CARL MICHAEL SEIBERT,
Petitioner

v.

DWIGHT T. BAPTIST, et al.,
Respondants[1]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Carl Michael Seibert, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed without opinion the decision of the United States District Court for the Northern District

[1] Frank Magill, Jr., Acting District Director; Lee Willingham, Revenue Officer; Frank McCammon, Criminal Intelligence Division of the Internal Revenue Service; and secreted party Agent Larry Hyatt if granted permission.

of Alabama.

Petitioner prays that this Court consolidate the proceedings in this case with that of *Elizabeth Jane Hall, v. United States, et al.*, No. 83-514, presently awaiting action on her petition for certiorari under facts identical to those in the instant case.

That upon review of the above proceedings this Honorable Court will reverse the judgment of the lower courts and remand the action to the District Court with directions that respondants are to bear the burden of proof on their claim to official qualified immunity, or in the alternative, if Seibert is to carry the burden of proof, then he respectfully requests that he be allowed discovery by interrogatories and request for admission presently on record, that petitioner's claim is timely under the applicable statute of limitations and, that petitioner's claim based on conspiracy to

violate federal law, states claim for refief under Title 42 U.S.C. § 1985, 1986.

STATEMENT OF THE CASE

On July 7, 1972, plaintiff Carl Michael Seibert was arrested by Huntsville City Police for being in possession of a controlled substance. At the time of his arrest he was driving a car bought for his use, but owned by his father. During a search of the car, the police found in the front part, a controlled substance which was later proven to have been planted there by paid informer, Steve Beshears.[1] In the trunk were the plaintiff's Martin D-35 guitar, an overnight bag with a change of clothes, and $460.00. While searching his parents' residence, the police found $2,262.01 in cash and some additional foreign currency which they stated they were taking for evidence. The plaintiff's father

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[1] Affidavit of Steve M. Beshears, paid informer for the Huntsville Police Department.

informed the officers that the bulk of the money was old bills that his son had saved for years, and included some silver certificates (twelve of which were consecutively numbered). After a discussion with the plaintiff's father concerning the foreign currency, the officers decided against taking it in.

Later that evening approximately 7:45 p.m., Randall Duck of the Huntsville Police Department made a phone call to waiting IRS agents. The agents arrived at the residence as the plaintiff was being taken away, at about 8:00 p.m.

The IRS agents then proceeded to question Seibert's parents about him and the aforementioned property being seized. They also asked for, and received, information concerning the location of the plaintiff's bank account, but were told that it was just a small checking account which he used to buy school books.

On Monday, July 10, 1972, at about 7:30 a.m., Randall Duck and two IRS agents came to see Seibert while he was incarcerated. The agents handed him "notice of seizure" which listed the property being seized under the authority of 26 U.S.C, § 6331. They further informed him that the seizures included all rights to property. Seibert was handed a termination of taxable year, pursuant to 26 U.S.C. § 6851, which set his taxes at $6,458.00 for the period of January 1, 1972 to July 7, 1972. As required by the termination letter under Section 443 of Title 26, Seibert filed the Form 1040, stating that he had no income for the period of time in question.

The automobile which the IRS agents seized was owned and paid for by Seibert's father, but was purchased for Seibert's use. Seibert and his father made numerous visits with IRS agents in attempt to prove that the

automobile seized had been in a bailee-bailor relationship, Seibert being bailee. They presented many checks and documents relating to the automobile, and Seibert offered to sign a release as to his property interest. In fact, the IRS subpoenaed State Farm Insurance records. The offers made by the Seiberts were refused by the IRS agents.

In early August of 1972, Seibert received a phone call from Veronica (Ronnie) Potter, whom he had dated in 1970 and 1971. She had heard through mutual friends about his arrest and IRS seizures. He told her that one of the seizures was of the Martin D-35 guitar that she had given him as a gift. After expressing sympathy with Seibert's plight, Ms. Potter hung up. Later that same month, Seibert received a letter from her explaining that she had gone to the IRS and, claiming ownership of the guitar, they had turned it over to her, and she intended to

either keep it or sell it. In fact, however, the Martin D-35 had been registered in Seibert's name since early 1971 at Martin and Company under the serial #269211.

Shortly thereafter Seibert contacted the IRS agents assigned to his case about the guitar. They told him 'it was his problem if he couldn't keep his love life straight, and as far as the IRS was concerned it was a matter between Ms. Potter and himself.

On or about October 12, 1972, Seibert and his father received notice of auction which was to take place on October 26, 1972. On October 19, 1972, they filed an action to compel an explanation as to how the tax was computed as the basis for seizure. They accused the Director's actions as being without foundation or cause and Seibert claimed violation of the United States Constitution 's Fifth Amendment.

The U.S. Attorney opposed the action by Seibert on the basis of 26 U.S.C. § 7421(a) and further requested the court dismiss Carl Michael Seibert and his claims in the action, and to hear only the issue of the ownership of the automobile raised by Carl Edward Seibert (plaintiff's father). The Government further requested that a bond be posted on the automobile. The trial court followed the Government's request and allowed only the issue on the automobile to stand.

After the death of Carl Edward Seibert, executrix Mary Constance Seibert was substituted as plaintiff in that civil action. On November 19, 1973, United States District Court Judge Seyborn Lynn, by preponderence of evidence ruled for Mrs. Mary C. Seibert. The collection department of IRS continued to write or call Seibert weekly about paying the alleged tax. Seibert continued trying to convince different

branches and agents to examine evidence compiled to prove his innocence, but they would not turn the first page. His efforts included visits to the Criminal Intelligence Division of IRS with information about illegal income of persons involved in entrapment of others to cover their own actions and the income made therefrom. He sent affidavits to the Director of IRS stating that, under penalty of perjury, he had not been in the business of selling drugs or narcotics. He filed amended returns and wrote for conferences in which agent Robert Jones refused to receive or examine any of the evidence offered by Seibert, however, he stated that if the plaintiff would admit to the right amount of drugs he sold, they might reduce his tax liability.

On August 9, 1974, Seibert received his 90-day letter, or Notice of Deficiency (some 25 months after the jeopardy assessment seizure)

and, on a contingency agreement, hired counsel to file his petition in tax court which requested the return of the U.S. Currency and currency collection, bank account and Martin D-35 guitar. The case was assigned No. 8724-74.

On January 23, 1975, in an appellate conference, with Seibert and his attorney Charles Ray present, the regional counsel and an appellate agent, Herb Law, stated they would review some evidence. Seibert gave them some transcripts and was tiven a receipt, as he requested.

Then teh case which was set for October 20, 1975, was pulled off the docket by the regional counsel. Seibert's counsel told him the amount of money involved was not worth the time and expense of recovery. Seibert paid the counsel with money borrowed from his mother, Mary C. Seibert. He then wrote the tax courts and had the case redocketed.

After the case was pulled from trial

status by regional counsel, Bob West, but before the request for redocketing, the plaintiff, through his attorney, Phil Geddes, requested a review of his file through the Freedom of Information Act. After receiving a standardized letter in which the IRS requested additional time to comply, Mr. Geddes received a request for power of attorney, and then, finally, a third letter was received which stated that they were unable to locate the file or the requested information. Assuming he could rely upon this information given by the IRS, Mr. Geddes naturally believed there could be no appeal, but some five years later the plaintiff discovered it had been wrongfully and intentionally withheld.

The plaintiff succeeded in having his case redocketed in Tax Court, but upon realization of a trial, the IRS counsel withdrew their claim of a deficiency and argued that the Court

lacked jurisdiction. Upon a stipulation of the parties, and the claim by the Tax Court that it lacked jurisdiction on the issues other than the plaintiff's alleged 'tax liability', the order on this case was simply to allow the dropping of the assessment which would allow the Federal District Court to have jurisdiction against a renewed claim to bar teh action under the Anti-Injunctive Act. Tax Court Judge William Quealy told the plaintiff and his counsel that the IRS wished to drop their assessment and that the Tax Court lost its jurisdiction on that basis. When plaintiff inquired into the effect of any statute of limitations, Judge Quealy told them that "the statute of limitations would start to run from the date of the Tax Court decision which would end the Commissioner's claim against Mr. Seibert."

The decision and stipulation were agreed

upon and on January 17, 1977, were filed with the Tax Court.

Warren E. Mason, Attorney at Law, told Seibert that this case would be too costly to litigate and it would involve years of effort, even if he were successful in getting the case to the jury.

Seibert filed his Complaint in the United States District Court for the Northern District of Alabama against the following Federal agents of the Internal Revenue Service in their own individual capacities: D.T. Baptist, Columbus Sanders, Frank W. McCammon, Lee Willingham and Frank Magill, Jr. and against persons, firms, or corporations whose names are unknown to the plaintiff but will be added by amendment as soon as ascertainment of same is made.

Seibert invoked jurisdiction in the District Court under Sections 1331, 1343, 2201, and 2202 of Title 28; Sections 1983, 1985, and

1986 of Title 42; and the Amendments to the United States Constitution.

Seibert alleged violations of, and conspiracies to violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Seibert later filed an Amended Complaint and, for clarification, filed an Amendment to the Complaint. Seibert was unable to determine the address of Steven Beshears or place upon which service could be made.

Prior to the defendants' motion to dismiss, or in the alternative motion for summary judgment, being granted, there were some thirty-four pleadings filed, which included interrogatories and requests for production of documents, all of which were denied. On August 11, 1978, the District Court granted the Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Seibert gave

notice of appeal along with a motion for appointment of counsel or alternative counsel in an advisory capacity which were filed on September 5, 1978. On the 6th day of September, 1978, the Motion for Appointment of Counsel or Alternative Counsel was denied.

The appeal was taken and Seibert's Appellant Brief was filed on November 19, 1978.

On May 3, 1979, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's Opinion of August 11, 1978. Then on Petition for Rehearing, filed on May 22, 1979, the Court below reversed on what may have been only the Fifth Amendment jurisdiction on the basis of *Davis v. Passman*, 99 S.Ct. 2264, 60 L.Ed.2d 1979. Appellees Petition for Rehearing was filed on August 27, 1979, but was denied on September 21, 1979 on the

defendants' immunity. Seibert also petitioned, but it was denied. Seibert then petitioned the United Supreme Court for petition for writ of certiorary, which was opposed by the Solicitor General as premature. On June 16, 1980 the petition was denied.

On remand to the District Court, Judge Propst entered numerous orders, barring discovery by plaintiff's Interrogatories, Request for Admissions of Fact and Production of Certain requested IRS Documents and Specific Numbered Internal Revenue Manuals. However, the court required the case to be tried against the "least culpable" ofthe defendants. It found as a matter of fact that there was not any improper IRS program involving the IRS agents. When Seibert offered proof from the Special Agent Thomas S. McWhorter that, in fact, Seibert had been one of those targeted fro the program, the district court excluded that

evidence from jury (Transcript 179-196).

On March 22, 1982 the court dismissed Seibert's case against all the respondents.

An appeal was timely taken and on May 27, 1983, the Eleventh Circuit Court of Appeals affirmed with no opinion. The petition for rehearing was denied on August 1983.

REASONS FOR GRANTING THE WRIT

1. *The District Court erred in holding that plaintiffs, in this Constitutional Tort action, was required to disprove the Defendants' claim of qualified immunity in order to survive their motion for summary judgment.*

Recent developments in the law of qualified immunity now make it necessary to resolve an issue upon which the various circuits are divided. This Court's decision in *Butz v. Economou, infra,* and *Harlow v. Fitzgerald, infra,* advocating the use of summary judgment procedure in resolving claims of qualified immunity in a *Bivens* type action, makes it imperitive that the Court address the issue of which party bears the burden of proof under the qualified immunity defense.

In *Butz v. Economou,* 438 U.S. 478, 507-508, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978) this Court

admonished the circuits that official "good faith" qualified immunity was a proper subject for summary judgment in 42 U.S.C. § 1983 and Constitutional Torts actions. The subjective prong of the defense as it had developed since *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975), requiring as it did an inquiry into the defendant officials' state of mind, had proven unwieldly for summary judgment practice. Therefore the Court in *Harlow v. Fitzgerald*, 457 U.S. ____, 73 L.Ed. 2d 396, 411, 102 S.Ct. 2727 (1982) abandoned the subjective prong and adopted an essentially objective test of good faith. *Harlow's* most significant posture however was its sweeping prohibition against all discovery pending resolution of the qualified immunity issue. In those circuits which place upon the plaintiff the burden of disproving the plea of qualified immunity, the denial of all discovery

substantially increases the burden he must carry. See *Herbert v. Lando*, 441, U.S. 153, 169, 60 L.Ed. 115, 129, 99 S.Ct. 1635 (1979).

Previous decisions by this Court have been equivocal with regards to which party carries the burden of proof on the defense. *Scheuer v. Rhodes*, 416 U.S. 232, 249-250, 40 L.Ed.2d 90, 104, 94 S.Ct. 1683 (1974) reversed the trial court for granting the defendants' motion to dismiss on the qualified immunity defense where no evidence warranting a finding of good faith had been introduced. However, the courts subsequent decision in *Procunier v. Navarette*, 434 U.S. 555, 565-566, 55 L.Ed.2d 24, 33, 98 S.Ct. 855 (1978) reinstated a summary judgment for defendant officials claiming qualified immunity although no evidence was introduced that the officials acted in good faith or had not violated a 'clearly established' constitutional right.

More recently the Court in *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980) directly held that the burden of pleading the qualified immunity defense was on the official claiming the affirmative defense. Although the Court's rationale for placing the burden of pleading on the defendant would argue forcefully for placing the burden of proof on the defendant as well, Justice Powell in his footnote 24 to the *Harlow* opinion specifically stated that the burden of proof question was still unresolved. *Harlow*, 73 L.Ed.2d 396 at 408.

The ambiguity of the Court on this matter is reflected in the decisions of the circuits. The District Court below applied the 'shifting burden' approach which is presently in general use throughout the Fifth Circuit. That approach set out in the case of *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981) and relied on by

the Court below states:

> "Once the official has shown that he was acting in his official capacity and within the scope of his discretionary authority, the burden shifts to the plaintiff to breach the officials immunity by showing that the official lacked 'good faith'." 651 F.2d at 1121.

Decisions of the Fifth and Eleventh Circuits after *Harlow* indicate that the plaintiff will retain the burden notwithstanding the demise of the subjective prong of the immunity defense. See *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982), and see *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982) (citing *Barker*). This position however is at variance with that taken by the First, Fourth, Sixth and Ninth Circuits which uniformly placed the burden of proving the defense squarely on the defendant.[1]

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[1] *Saldana v. Garza*, 684 F.2d at 1163, footnote 14. "... while the Fifth Circuit rule has not enjoyed universal

Moreover, *Harlow* has equally assured the Sixth Circuit that the burden lies with the defendant:

> "an assertion of qualified immunity is an affirmative defense which must be pleaded and proved by the defendant official . . . This conclusion is buttressed by the Supreme Court's recent decision in *Harlow v. Fitzgerald* (citations ommited) . . . When discussing how the new standard whould be applied, however, the Court inferred that the burden of proving the qualified immunity defense should be on the defendant official."
> 706 F.2d 751, 754 (6th Cir. 1983)

The decision of the District Court in the instant case to grant summary judgment for the

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acceptance, see e.g. *Haislah v. Walton*, 676 F.2d 208, 214-215 (6th Cir. 1982)(defendant bears burden of showing that they have acted in good faith); *Wolfel v. Sanborn*, 666 F.2d 1005, 1007 (6th Cir. 1982)(burden on defendant); *Harris v. Roseburg, et al.*, 664 F.2d 1121, 1127 (9th Cir. 1981)(burden on defendant); *Logan v. Shealey*, 660 F.2d 1007, 1014 (4th Cir. 1981) (burden on defendant), this panel is bound by the rule that places the burden of breaching an asserted immunity upon the plaintiff."

several defendants on the grounds that plaintiff had not met his burden of rebutting their claim of qualified immunity, presents this Court with an opportunity to resolve the conflict on this issue. Resolution of this issue by placing the burden of proof of the qualified immunity defense on the defendant will tie together conceptually the objective framework for good faith immunity begun in the *Harlow* case.

The importance of the problem of allocation, burden and the degree of proof in addressing summary judgment taken pursuant to Federal Rules of Civil Procedure, Rule 56b & c are exemplified by the instant case and *Hall v. United States*, No. 83-514. If, as stated above, the burden of proof is allocated to Federal or State defendants, it must be assumed that if there is damaging information under their exclusive dominion and control, it will be made available to the reviewing court.

However, it is questionable whether defendants would produce inculpatory information. See *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486, 491, 368 U.S. 464, 473 (1962); *Hobson v. Wilson*, 556 F.Supp. 1157, 1178 (D.D.C. 1982) and *Seibert v. D.T. Baptist*, No. 77-PT-0951 (N.E.D. Ala. 1982). If the plaintiff is to carry the burden of proof, then he or she should be allowed to complete discovery of the probative material with the assistance of the court if unreasonably resisted by defendants or their Government counsel. In the instant cases the burden was placed on Seibert and Hall as plaintiffs, however the most important and probative part of Seibert's discovery (request for admissions and interrogatories promulgated upon Internal Revenue Manuals) was barred by the District Court.

The significance of these Internal Revenue Manuals as they relate to intentional violations

by defendant Federal officials and misrepresentations to this Court by those defendants' counsel cannot be overstated. Several court rulings were based upon misrepresentations by Government counsel, in particular, decisions relating to the Notice of Deficiency. However, Internal Revenue Manuals, unavailable to the court at that time, made it clear that Notice of Deficiency was required within 60 days from the date of the assessment.

INTERNAL REVENUE MANUAL 4500-129 (9-15-71) 4584.8, Immediate Revnew and Issuance of 90-Day Letters, provides in pertinent part, that:

> (1) *Immediately after assessment*, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. *It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.* (emphasis added)

Section 4585.1, paragraph (2) of the Internal Revenue Manual states, in pertinent part, that:

> ". . . the review procedures in IR Manual 4584.8 relating to jeoparty assessments apply also to assessments under I.R.C. 6851 . . ." (App. O, o-11)

Internal Revenue Manual 4585.1(2), when read in conjunction with IR Manual 4584.8(1) makes it clear that the statutory Notice of Deficiency (90-day letter) was to be issued "within 60 days from the date of assessment."

The respondents and their Government counsels point to IR Manual 4585.3 in their endeavor to mislead the unweary. However, the reader who is armed with IR Manual 4584.8 and the Internal Revenue Code will discover that IRM 4585.3 which states that no statutory notice of deficiency will be issued for the short period simply refers to the 10-day period (short period) of I.R.C. 6331 which is only the "waiver" or elimination of the 10-day statutory notice requirement of I.R.C. 6331 before seizure of

property when under I.R.C. 6851 or 6861 jeopardy-termination assessment.

The Government counsel may express their absence of knowledge during the case of *Laing v. United States*, 423 U.S. 161, 96 S.Ct. 473 and 46 L.Ed.2d 416 (1976) as to the existence of the IR Manuals which required the same due process in both I.R.C. 6851 and 6861 (e.g. Notice of Deficiency was required within 60 days of the assessment). However, it is clear they cannot claim they were ignorant of that fact in *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983). In *Hall, id.*, the same Department of Justice, Tax Division, counsels which were involved in *Seibert v. D.T. Baptist*, induced the 6th Circuit to rule that the IRS agents lacked knowledge of Notice of Deficiency requirements by IR Manuals until *Laing, supra.* (See *Elizabeth Jane Hall, Petitioner, v. United States, Thomas P. McHugh and Elmer B. Snider,*

Respondents, No. 83-514, Motion to Defer Ruling and to Consolidate, Exhibit A.

Whether via mistake or fraud, the respondants prevailed by virtue of their superior adversary position and the courts reliance thereon. There can be little question that in light of the granting of two protective orders in the case at bar and the court's blocking answers to very important interrogatories and request for admission, that there is a great necessity for clarification to the degree and allocation of the burden of proof. It is clear from the IR Manuals 4584.8 and 4585.1(2) that fundamental due process would have required the availability of a reasonably prompt access to a hearing before a taxpayer was deprived of his property for a period of many years as was Seibert.

The instant case exemplifies the damage that a bar of discovery against relevant

can do to a case where the burden of proof is placed on the plaintiff to disprove general good faith claims of official defendants. If the plaintiffs and the courts rely on Government counsels and government officials *ex mero motu* to produce inculpatory evidence, there is a great probability that a plaintiff in a constitutional tort case will never survive a defendant's motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56.

For the above stated reasons, this Honorable Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to allow us to further develop this fundamental and important question of federal law, the allocation of and the degree of burden of proof.

2. *The District Court erred in finding that the Anti-Injunctive Act, 26 U.S.C. § 7421(a), which precluded an earlier action by plaintiff, did not toll the statute of limitations on plaintiff's tort claim for malicious prosecution of a bad faith termination assessment against certain Internal Revenue Service officials.*

While the finality of the court below's judgment on statute of limitations is unclear by virtue of its refusal to certify for interlocutory appeal, it nonetheless implies that Seibert was barred by a one-year statute of limitations from bringing any lawsuit against Federal tax officials and that the original complaint was not timely filed. (App. D, d-19) However, denials of the majority of Seibert's motions were based on statute of limitations while the court below granted respondants'

protective order barring discovery of probative information exclusively under control of the defendants on the same grounds. Further, the District Court placed the burden of proof on Seibert to prove the defendants knowingly violated a constitutionally protected interest.

Plaintiff produced additional affidavits of IRS Agents Dudley M. Weathers and James Pertree which attested to the unreasonableness of the amount and the termination assessment. The affidavit of IRS Agent Pertree also attested to the program which seized terminated taxpayer's assets for purpose of interferring with their ability to retain "expensive counsel" and to make bond. As a result of those IRS Agents' affidavits, on March 22, 1982, the court below adopted its view on statute of limitations. Consequently, Seibert is compelled to address the issue.

The gravamen of Seibert's complaint, as

characterized by Judge Sam Pointer is that of a malicious prosecution and harassment case via the initiation and continuation of a bad faith termination-jeopardy assessment made pursuant to 26 U.S.C. § 6851 (App. A, a-1). Judge Propst remarked,

> "The court is, quite frankly, surprised that this case could be pending at this point without a resolution of the statute of limitations issue; and the court is of the opinion that the issue may well be determinative of the case." (App. D, d-23).

Judge Propst's finding that the statute of limitations issue had not been addressed was simply in error.

The issue of statute of limitations arose during the pendency of defendants' Motions and Supplemental Motions to Dismiss, or In the Alternative, Motion for Summary Judgment, filed September 26, 1977, and both parties had written to that issue. (See Supplemental Record, No. 78-3007, Plaintiff's Supplemental Brief, Argument and Memorandum of Law in Opposition

to Defendants' Motion to Dismiss @p.3, filed April 12, 1978). Further, oral argument was granted and from the bench, Judge Pointer told the parties that the statute of limitations was not dispositive of jurisdiction or the case and for the parties not to waste their time or the court's time by arguing that point. He stated two grounds for that ruling: 1) that Mr. Seibert's complaint is couched in the language of a malicious prosecution, and; 2) that plaintiff filed an action earlier to invoke the jurisdiction of the court, and the issue of an earlier filing had been collaterally decided by *Seibert v. Baptist*, CA No. 72-936-NE (N.D. Ala. 1972). In granting the defendants' Motion to Dismiss/Alternative Summary Judgment on August 11, 1978, Judge Pointer added one additional reason why this specific action could not be filed. He determined that this is a case "with respect to Federal taxes." (App. A, a-

Consequently, if a lawsuit is a case "with respect to Federal taxes," plaintiff may not acquire jurisdiction through 28 U.S.C. § 2201, 2202. Additionally, if the plaintiff has outstanding "tax liability" and the court determined that the plaintiff did not come under the exception of 26 U.S.C. § 7421, et seq., as was the case in *Seibert v. Baptist, et al, supra*, the Federal Court would lack jurisdiction.

Judge Propst reaffirmed Judge Pointer in his holding that the instant case is one "with respect to Federal taxes," but ruled that the lawsuit was barred by the Alabama one-year statute of limitation because the suit was not filed before the resolution of the "tax liability" Such a ruling is absolutely inconsistent with the facts, legal history, evidence and both Federal and Alabama law. When Seibert resolved the "tax liability" in his favor, it removed the claim of tax liability, and with it, the

bar against jurisdiction imposed by the Anti-Injunctive Act in Federal Court. Within 6 months of the removal of burden imposed by IRC § 7421, this action was again filed.

Alabama, as many other states, requires that a plaintiff who is alleging malicious prosecution or malicious abuse of process, as in the case at bar, must first prevail in the action upon which he has stated was wrondfully taken. In *Hudson v. Chancey*, 385 So.2d 61 (Civ. App. 1980), the court dismissed even a counterclaim of malicious prosecution for lack of maturity when defendant had not prevailed. See also *Kroger Co. v. Puckett*, 351 So.2d 582 (Civ. App. 1977); *Brown & Rood, Int. v. Big Rock Corporation*, 383 F.2d 662, 665 (5th Cir. 1969) which states:

> "No cause of action for malicious prosecution comes into existence until the termination of the particular judicial proceeding which is the gravamen of the malicious prosecution action."

While the law of Alabama, as it relates to malicious prosecution, barred the filing of this action any earlier for want of maturity, this case was burdened with another problem unique to constitutional violations or malicious prosecution/abuse of process claims: abuse of process claims arising out of the assessment and collection of tax are barred by the Anti-Injunctive Act of I.R.C. 7421(a) and its counterpart 28 U.S.C. § 2201 and 2202 until the tax liability is cleared. This prohibition against Federal Court jurisdiction while there is alleged (as in Seibert's case) or potential tax liability flows even to actions which claim violations of United States Constitutionally protected interest (as in the instant case). *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Alexander v. Americans United, Inc.*, 416 U.S. 752 (1974); *Black v. United States*, 534 F.2d 524 (2nd 1976).

While it is true that I.R.C. § 7421(a) can preclude suits for Constitutional violations and damages for present activities of IRS agents during the pendency of an alleged outstanding tax liability, the "Anti-Injunctive Act" was never intended to be a bar against review of past wrongful conduct in the form of a *Bivens* action. In *Graham v. United States*, 528 F.Supp. 933, 938 (E.D. Penn. 1981), the district court distinguished between the "present and future activities" and past activities as they apply to the Tax Anti-Injunctive Act. In rejecting the defendant's argument that the "Tax Anti-Injunctive Act bars the award of damages for tax-assessment activities" the court held that:

> "if a taxpayer utilizes those (tax review) proceedings and prevails, for instance, if he is acquitted in a criminal prosecution by showing bad-faith Fourth Amendment violation, nothing in the Act prevents a later damage action." *id.* n.7.

> "In addition (to the good faith qualified immunity defense), if taxpayer did not prevail at the earlier proceedings, the officials could seek to take advantage of the doctrines of *res judicata* and *collateral estoppel*. Accordingly, I hold that the Tax Anti-Injunctive Act does not require dismissal of damage claims arising from past activities." *id.* @ 938.

Analogizing the bar of the Anti-Injunctive Act to that of malicious prosecution is judicially economical as it would be in harmony with the intent of the Anti-Injunctive Act while providing redress if the taxpayer later prevailed if the tax assessment was in bad faith. To hold otherwise is to require superfluous litigation in an attempt to toll the statute of limitations. Equitable tolling, limits superfluous litigation. *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968); *Morris v. Houg*, 495 F.Supp. 797 (D.C.W.D. 1980). A contrary ruling would afford a constitutional tort remedy only to those taxpayers who have the wealth to satisfy

an alleged tax assessment within statutory limitations, while those who were required to first exhaust their tax court review would be without a remedy at its conclusion. An economic bar which ultimately deprives an individual a remedy is not consistent with due process . . . a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

The issue addressed above is an important one. As stated, a taxpayer who is wrongfully excluded from review by the Federal District Court will ultimately be denied a remedy at the conclusion of the United States Tax Court review and the only determinative factors will be the taxpayer's economic condition versus the amount of the assessment. Additionally, allowing the court below's ruling to stand is

to require an aggreived taxpayer to continually endeavor to usurp the Anti-Injunctive Act in an attempt to preserve a remedy by filing superfluous litigation.

3. *The District Court erred in holding that plaintiff's claim for relief under 42 U.S.C. § 1985 and 1986 based on a conspiracy between Federal and State officials, did not state a claim for relief where only violations of Federal rights were alleged.*

In the instant case the allegation against the respondants is that while in concert with local officials they conspired with them to maliciously prosecute a tax case for reasons other than a good faith interest in revenue and to insure the continuation of the prosecution by withholding procedural due process

and thereby prevent subsequent review. While this Honorable Court has theoretically removed the distinction between the immunity enjoyed by State and Federal officials in *Butz v. Economou*, 98 S.Ct. 2894, 438 U.S. 489 (1978), the treatment by the Federal Courts are nonetheless different. Federal Officials enjoy a much greater success rate in summary judgments than their State or Local counterparts. Examples are *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983) versus *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983) and *Seibert v. D.T. Baptist, District Director of Internal Revenue Service*, ____ F.Supp. ____ (N.D. Ala. 1982), appeal docket, No. 82-7163 (11th Cir. May 27, 1983), rehearing denied Aug. 11, 1983; versus *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982). The many cases in which Federal Courts have treated Constitutional Tort claims as an interference with government,

while the same court treats the same kind of a claim under 42 U.S.C. § 1983 et seq. with an eye toward doing substantial justice are too lengthy to list.

Consequently, Federal Courts regard 42 U.S.C. § 1985 & 1986 with greater respect as a remedy for redress of conspiracies to violate constitutionally protected rights. As a result, the *Bivens* action in many law review articles has earned the reputation of being the "hollow remedy of *Bivens*."

Contrary to the lower courts holding, there is no requirement that an alleged conspiracy occur under color of State law. This Honorable Court held in *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971), no "State action" is required in actions brought by black petitioner in the protection of life, liberty and property.

In *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), the court held an actionable private

conspiracy need not be based on racial discrimination, and in *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (1975), the presence or absence of state is not a factor.

In *Hobson v. Wilson*, 556 F.Supp. 1157, 1166-1167 (D.D.C. 1982) the court distinguished actions taken under 42 U.S.C. § 1983 from those taken under 42 U.S.C. § 1985:

> ". . . conspiracies that are actionable under 42 U.S.C. § 1985(3) exist whether or not the participants act under color of any official authority."

The courts below erred in their determination that conspiracies by Federal IRS agents were required to be taken under color of state law before Seibert could invoke jurisdiction for alleged conspiracies. The "state action" requirement for Federal Court jurisdiction under 42 U.S.C. § 1985 & 1986 is clearly erroneous and should be reversed by this Honorable Court.

4. *The District Court erred in refusing to consider evidence of Defendants' tax assessment procedures as detailed in their official Internal Revenue Manuals and sworn affidavits of former Agents on the issue of whether Defendants should prevail on their qualified immunity defense.*

The Federal Court of Appeals for the Eleventh Circuit has so far sanctioned such a departure by the District Court of the Northern District of Alabama as call for an exercise of this Court's power of supervision; specifically the court's complete disregard of the disputes of material facts and the evidence offered by Seibert. The fuling of the District Court is completely contrary to both the spirit and the purpose of Rule 56(b)(c) of the Federal Rules of Civil Procedure.

The gravamen of Seibert's complaint has been consistent: during the pertinent period the Internal Revenue Service operated under an illegal program that was intended to undermine the constitutional rights of certain class of persons of which Seibert was believed to be a member. In the case below Seibert was the object of the unlawful program and has consistently for the last ten years been attempting to develop the necessary facts to support his claims and to seek vindication of them.

Seibert alledges that he was maliciously prosecured by means of a bad faith assessment under a "program" which was intended to seize all assets and precluded review by withholding the statutory review procedure (e.g. the intentional withholding of the Notice of Deficiency). The Internal Revenue Manual governing the procedure in July of 1972 for the termination assessment of Seibert's taxable year is cited

at IRM 4585.2(1). (App. O, o-11)

The assessment made against Seibert was more than twice the amount at which the Internal Revenue Service valued his assets. Further, the defendants refused to offer "other facts" to explain their apparent disregard of the IR Manual's standard for reasonableness, and when interrogatories promulgated upon the respondents' compliance therewith, they moved for protective order.

In the affidavit of retired IRS Audit Agent James Pertree, he shows that even under the standard for setting assessments in the illegal program, Seibert's assessment was unreasonable. The standard referred to by Agent Petree was the practice of setting the assessment equal to the amount of money or other valuable property held by a person at the time of arrest. This practice is discussed in IR Manual Supplement, Termination of Taxable

Periods Under 6851, Section 2, Background (App. O, o-1). See also App. O, o-3 and App. O, o-10.

A majority of this information came after the depositions were taken. When Seibert attempted to challenge the general good faith claim with requests for admissions and interrogatories based on IR Manuals, the respondants moved to block discovery via protective order. As grounds they cited the court order of Aug. 4, 1981, of Absolute Immunity and Statute of Limitations. The court below, with apparent disregard for the problems Seibert had been having with perfecting any discovery of information about the IR Manuals and without requiring defendants to show any specific objections under Rule 33a of Fed. R. Civ. P., granted respondants' discovery prohibition pursuant to Fed. R. Civ. P., R. 26(1).

In *Washington v. Cameron*, 411 F.2d 705

(D.C. Cir. 1969) the court of appeals held that the court below erred when it refused to require superintendent of government hospital to answer interrogatories because it prevented plaintiff from formulating genuine issues of material fact. Moreover, *Harlow v. Fitzgerald*, 102 S.Ct. 2727, @ 2737 n. 26, noted that summary judgment shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material facts and that the moving party is entitled to a judgment as a matter of law. However, the court considering summary judgment is required to view the evidence in the light most favorable to plaintiff, or the party opposing the motion and where motive and intent play leading roles, the proof was largely in the hands of the alleged conspirators and hostile witnesses "the plot

thickens." *Poller v. Columbia Broadcasting System*, 825 S.Ct. 486, 491, 368 U.S. 464, 473 (1962). So long as there were disputes, summary judgment was improperly granted. C.F. *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980), *Maclin v. Paulson*, 627 F.2d 83 (7th Cir. 1980), *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (1980), and further in *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), Circuit Judge Clark noted in reversing the District Court:

> "(f)inally, there is some question as to whether summary judgment may be an appropriate means of resolving a state of mind issue . . ."

However, even if the district court did not abuse its descretion by barring discovery as to inquiries about the specific "good faith" claimed by respondants, he erred by holding there was no program to abuse seizure powers of the IRS. Then for the District Court to

grant summary judgment to the most culpable of the respondants, then change the theory of the action in the last minute, and prohibit proof of the program which was the impetus for the improper assessment and seizure of property, is an abuse of judicial discretion. See retired IRS Agent Thomas McWhorter's proferred testimony @ TR 179-196.

The program's existence has caused the respondants to be evasive and be defensive with Seibert throughout the handling of his entire case. The "program" provides the motive to fabricate and conceal, as is exemplified in the instand case, and in *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983) which is a decision, at a minimum, based on an unintentional misrepresentation.

The disputes of material issues are great.

The respondants could not have answered Seibert's interrogatories in light of IR Manuals and still have claimed "good faith" defense. The affidavits of IRS Agents Pertree, Weathers and McWhorter submitted by Seibert were so damaging to the respondants' defense that the bar of discovery was the only method to preserve even qualified immunity defense.

It would be impossible to expect of any plaintiff in a 42 U.S.C. § 1983 et seq. and/or *Bivens* action to produce a greater sufficiency of evidence than the intentional ignoring of defendants' own procedure and agents of the same agency attesting to the wrongful conduct of the defendants themselves. While factual in nature, Summary Judgment is a question of law, it can not be legally fairly stated that under the evidence, the respondants were as a mat of law, entitled to Summary Judgment.

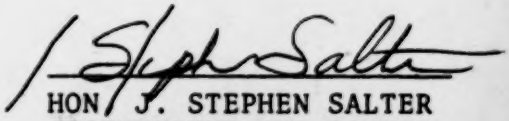
As stated above, there was such a departure

from established federal law that this Honorable Court should intervene.

CONCLUSION

For the reasons set forth above, Seibert submits that a writ of certiorari should be issued to review the opinion of the court below granting summary judgment and its affirmation by the Court of Appeals for the Eleventh Circuit on August 11, 1983.

November 9, 1983.



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APPENDIX A.

[594 F.2d 423]

Judgment and Opinion of the Court of Appeals.

In the United States Court of Appeals, for the Fifth Circuit.

Carl Michael SEIBERT, Plaintiff-Appellant, versus D. T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007, Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

(May 3, 1979).

Taxpayer sued internal revenue officials seeking monetary damages based on alleged abuse of authority in terminating plaintiff's taxable period and in failure to follow prescribed procedure in making jeopardy assessments of income tax deficiency, with complaint also alleging that defendants unlawfully seized plaintiff's property and denied him due process. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., dismissed, and plaintiff appealed. The Court of Appeals, affirmed on basis of the district court's memorandum opinion holding that: (1) to extent that complaint was read to assert a claim against United States, it was barred by sovereign immunity; (2) declaratory judgment statute is not an independent basis of jurisdiction; (3) recovery could not be had under civil rights acts since defendants were federal officials acting under color of federal law, and (4) no right of action in damages was to be implied directly under the Fourth and Fifth Amendments.

Affirmed.

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Appeal from the United States District Court for the Northern District of Alabama.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the Memorandum of Opinion of United States District Judge Sam C. Pointer, Jr., a copy of which is an appendix hereto.

SEIBERT v. BAPTIST

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

CARL MICHAEL SEIBERT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CA 77 P 0951 NE
	)	
	)	
D. T. BAPTIST,	)	
DISTRICT DIRECTOR	)	
OF INTERNAL REVENUE,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION BACKGROUND

What can only be characterized as an unusual set of events has led to the defendants' motion to dismiss the plaintiff's complaint. It is this motion which is currently before the court. Since both parties have submitted memoranda and affidavits in support of their respective positions, the motion will be treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

On July 7, 1972, plaintiff Carl Michael Seibert was arrested by the Huntsville Police Department for possession of LSD. At the time of his arrest plaintiff was apparently driving his father's car. The Huntsville Police seized the car and its contents, which included a guitar and a currency collection.

On July 10, 1972, agents of the Internal Revenue Service served plaintiff with a Notice of Termination of Taxable Period pursuant to Section 6851 of the Internal Revenue Code[1] by which plaintiff's income tax liability for the period January 1, 1972, to July 7, 1972, was made immediately due and payable. Plaintiff was also served with a Notice of Seizure under I.R.C. Section 6331.[2] By this notice it was indicated that the car and its contents

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[1] 26 U.S.C.A. § 6851, as it was in force in 1972, reads in applicable part as follows:

> *If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, . . . the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated . . .*

[2] 26 U.S.C.A. § 6331. In applicable part, that section reads as follows:

> *"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10 day period provided in this section.*

previously impounded by the Huntsville police were being seized by the IRS in partial payment of tax deficiencies proposed against plaintiff in the amount of $6,458.00. Plaintiff was never given information about how the deficiency was computed.

At this point, it becomes difficult to determine just what events transpired, and in what order. According to plaintiff's amended complaint, on October 19, 1972, plaintiff and his father initiated suit in federal court to enjoin the IRS from selling the seized property at auction, and to compel an explanation of the basis for the seizure. That suit was dismissed by the district court as to all material issues on November 1, 1972.[3]

At some point during this sequence of events, defendants' memorandum in support of its motion to dismiss indicates that the termination assessment against plaintiff was abated and a notice of deficiency[4] was issued to the plaintiff.[5] In response to the notice, plaintiff filed a

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[3] *Seibert v. D. T. Baptist*, CA No. 72-936-NE (N.D.Ala.1972). The basis for the dismissal was apparently 26 U.S.C.A. § 7421(a) which provides in material part:

> "... [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom [the] tax was assessed."

See *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

[4] 26 U.S.C.A. § 6212 provides that a taxpayer be notified in the event any deficiency in taxes owed is declared against such taxpayer.

[5] A stipulation entered into between the plaintiff and the Internal Revenue Service pursuant to plaintiff's request for a redetermination of his deficiency indicates that the deficiency notice was mailed August 7, 1974. The exact reason for the lengthy delay between the original termination assessment and notice of deficiency is not clear.

petition for redetermination of his tax deficiency,[6] with the United States Tax Court. Upon a stipulation of the parties, the Tax court entered an order on January 17, 1977, to the effect that there had been an overpayment in income taxes by plaintiff for the 1972 tax year in the amount of $2,893.15.[7] By the terms of the stipulation incorporated into the Tax Court's order, plaintiff did not waive *"any rights he may now have to proceed against the Internal Revenue Service or any employee for damages or restitution on account of the seizure and release of certain personal property . . . "* It is this reservation of right which forms the basis of the present controversy.

THE PENDING LITIGATION

On July 11, 1977, plaintiff proceeding *pro se*, filed a complaint against the District Director of the Internal Revenue Service, four officals of the IRS, two Huntsville Policemen, and a Madison County Circuit Judge.[8] The

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[6]26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency.

[7]*Seibert v. Commissioner of Internal Revenue*, No. 8724-74 (U.S.T.C. Jan. 17, 1977).

[8]Defendants Randall Duck and Gary Patterson, Huntsville Police Department officers, were dismissed as defendants by an order of this court dated October 4, 1977. Defendant, David R. Archer, a Madison County Circuit Judge, was determined to be insulated from liability by judicial immunity on November 10, 1977. *See Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Plaintiff failed to amend his complaint to state a cognizable claim against Archer within the 30 days granted by the court's order. Thus, the only remaining defendants are five officials of the Internal Revenue Service.

complaint, without alleging any statuatory basis for relief or grounds for jurisdiction of the court, sought recovery of property seized by the IRS, or compensation therefor. On defendent's motion, the court dismissed this complaint and granted the plaintiff thirty (30) days to amend the complaint to state a jurisdictional basis for the cause of action. Pursuant to this order, on January 3, 1978, plaintiff filed an amended complaint which the defendants' pending motion seeks to have dismissed.

By his amended complaint, the plaintiff alleged jurisdiction of this court pursuant to the fifth and fourteenth amendments to the United States Constitution, and under 28 U.S.C. §§ 2201-02, § 1331, § 1343, and 42 U.S.C. §§ 1983, 1985, and 1986. The gravamen of plaintiff's amended claim is that defendent IRS officials have abused their authority under 26 U.S.C.A. § 6851 to terminate plaintiff's taxable period, and that they did not follow the prescribed procedure under 26 U.S.C.A. § 6861[9] to make jeopardy assessments of income tax deficiency. Broadly read, plaintiff's complaint also alleges that the defendants subjected him to malicious prosecution and harassment, that they unlawfully seized his property, caused him and his family mental anguish, and denied him due process and the equal protection of the laws. In his prayer for relief plaintiff requests return of,

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[9]In material part, 26. U.S.C.A. § 6861 reads as follows:

> *"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall notwithstanding the provisions of section 6213(a), immediately assess such deficiency . . . and notice and demand shall be made by the Secretary or his delegate for the payment thereof."*

or compensation for, all previously seized property,[10] as well as compensatory and punitive damages, costs, and attorney's fees.

JURISDICTION OF THE COURT

The district courts of the United States are courts, the jurisdiction of which is *"limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given [them] jurisdiction."*[11] Serious questions are presented here with respect to whether this court has the authority to decide the potential merits of this case. Each of the jurisdictional allegations asserted by the plaintiff therefore requires close scrutiny.

CONSTRUCTION OF PLAINTIFF'S CLAIM AS ONE AGAINST THE SOVEREIGN

Defendents have devoted a substantial portion of their memorandum to the proposition that the plaintiff's claim,

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[10]As previously indicated, the seized property included an automobile, a guitar and a currency collection. According to defendants' memorandum, the car was released to plaintiff's father on a showing that he was its owner. The guitar, defendants state, was also released to a third person, Ms. Veronica Louise Potter, who demonstrated ownership of it. Plaintiff contends, however, that Ms. Potter had given the guitar to him as a gift, so that its release to her was improper. The final item seized was a sum of money which plaintiff claims was a currency collection of sequentially-numbered, uncirculated bills and silver certificates. Defendants' memorandum, however, suggest that when the money was seized there was nothing indicated by its appearance which distinguished it as a collection, and further, that a list of the serial numbers of the bills made at the time of the seizure indicated that none of them were sequentially numbered.

[11]*Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied* 336 U.S. 904, 69 S.Ct. 491, 93 L.Ed. 1069.

while nominally filed against officials of the Internal Revenue Service, is in actuality a suit against the United States as real party in interest. As such, defendants argue, plaintiff's claims are barred by the doctrine of sovereign immunity, by which the United States may not be sued without its consent.[12] Defendants also point out that while the Federal Tort Claims Act[13] swept aside a large portion of the government's immunity for the tortious conduct of its employees, the plaintiff may not seek recovery under the Act for a number of reasons. Most notable among these reasons asserted for the nonapplicability of the FTCA is the 28 U.S.C. § 2680(c) exclusion from the Act's provisions of "*[a]ny claim rising in respect of the assessment or collection of any tax...*"[14]

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[12]*See, e. g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. Alabama*, 313 U.S. 274, 281, 61 S.Ct. 1011, 85 L.Ed. 1327 (1941).

[13]By 28 U.S.C. § 1346(b), the district courts are given "*exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" Substantive provisions of the Tort Claims Act are found at 28 U.S.C. § 2671 *et seq.*

[14]28 U.S.C. § 2680(c). Other asserted justifications for the nonapplicability of the FTCA include plaintiff's apparent failure to exhaust administrative remedies as required by 28 U.S.C. § 2675(a), the 28 U.S.C. § 2680(a) exclusion from the Act of claims arising from the performance by a government official of discretionary duties, and, finally, the exclusion under 28 U.S.C. § 2401(b) of all claims not raised within the period of the Act's two-year statue of limitations.

[1] To the extent, then that the plaintiff's complaint is read to assert a claim against the United States, it would appear that this claim is barred by the doctrine of sovereign immunity, and the absence of any statutory exceptions for actions of the kind presented here. The court is of the opinion, however, that this determination does not dispose of the litigation. Presumably, defendants' sovereign immunity theories resulted from their expectation that the United States Supreme Court would clothe all federal executive department officials in the protection of absolute immunity from damages for injuries caused by their unconstitutional conduct. Had the Court adopted such an approach, the plaintiff's only possibility for recovery would have been against the United States. Contrary to defendants' expectations, however, in *Butz v. Economou*, — U.S. —, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that in suits for damages arising from unconstitutional action, federal executive officials are entitled only to the qualified immunity set out in *Scheuer v. Rhodes*.[15] This decision suggests the possibility of a claim by the plaintiff against the defendant officials in their individual capacities. The question whether such individual liability may in fact be imposed on the defendants requires consideration at this point.

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[15] 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975). In *Scheuer*, the Court dealt with the degree of immunity to be accorded state executive officals from civil rights actions under 42 U.S.C. § 1983. There the Supreme Court held that such officials were entitled to a qualified immunity from damage liability for constitutional deprivations. The extent of this immunity was seen to depend upon factors including the "*scope of discretion and responsibilities of the office*," "*the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based*," and the "*reasonable grounds*" and "*good faith*" belief in light of such circumstances by the officials that their actions were appropriate. 416 U.S. at 247-48, 94 S.Ct at 1692.

JURISDICTION OF THE DISTRICT COURT OVER CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

As noted previously, by the amended complaint, plaintiff alleged jurisdiction of this court over his claims against the defendants under several statutory and constitutional provisions. It appears clear that the statutory bases are without merit, and can be considered without extensive discussion. The possibility, however, of a direct action under the fourth or fifth amendments, based on the court's general 28 U.S.C. § 1331 *"arising under"* jurisdiction[16] requires close scrutiny.

[2] The first statutory basis for jurisdiction asserted by the plaintiff is the declaratory judgment provision of 28 U.S.C. §§ 2201-02. That this statute alone will not support plaintiff's cause of action is apparent for two reasons. First, the declaratory judgment sections do not establish an independent basis for federal jurisdiction, but rather only establish a separate remedy available in cases where jurisdiction otherwise exists.[17] Secondly, even if the declaratory judgment provisions authorized federal jurisdiction independently of any other basis, 28 U.S.C. § 2201 by its terms specifically excludes the use of

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[16] 28 U.S.C. § 1331(a) provides as follows:

> *"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."*

[17] *See, e.g., Red Lobster Inns of America, Inc. v New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975); *Brown & Root, Inc. v. Big Rock Corporation*, 383 F.2d 662, 666 (5th Cir. 1967).

declaratory judgments *"with respect to Federal taxes."* Clearly, then, this court has no jurisdiction over plaintiff's claim by virtue of 28 U.S.C. § 2201-02.

The plaintiff also alleges that federal jurisdiction is conferred over the present controversy by 28 U.S.C. § 1343. This statute is the jurisdictional basis for suits under 42 U.S.C. §§ 1983 and 1985. These sections allow a plaintiff to redress the deprivation of civil rights by authorities who act under the color of state law or by those who conspire to deprive such rights. In addition to 42 U.S.C. §§ 1983 and 1985 plaintiff further alleges the applicability of 42 U.S.C. § 1986, under which a person may be held liable for damages if such person neglects to attempt to prevent a conspiracy to deprive constitutional rights as such conspiracy is defined in § 1985.

[3] A recent per curiam decision of the Fifth Circuit Court of Appeals disposes of this asserted basis for federal jurisdiction in a manner adverse to plaintiff's contention. In *Mack v. Alexander*, 575 F.2d 488 (5th Cir. 1978), the plaintiff filed suit against certain officials of the Internal Revenue Service based on the defendants' alleged violations of constitutional rights stemming from an IRS attempt to levy on a joint bank account held by plaintiff and another party. Federal jurisdiction was asserted under 28 U.S.C. § 1343 and 42 U.S.C. §§ 1983 and 1985. In upholding the district court's dismissal of the action, the Fifth Circuit spoke in language applicable to the controversy *sub judice:*

> *"Section 1343 places original jurisdiction in the district courts when there is a substantive claim for violation of 42 U.S.C. §§ 1983 and 1985. However, we agree with the district courts ruling that these statutes*

provide a remedy for deprivation of rights under color of state law and do not apply when the defendants are acting under color of federal law."

575 F.2d at 489 (citation omitted). In the present case, similarly, plaintiff's only claims are that the defendants abused their authority under the federal Internal Revenue Code.

The final basis for jurisdiction asserted by the plaintiff, and the one which is by far the most complex is the general federal question jurisdiction of 28 U.S.C. § 1331. This statute provides the jurisdictional basis for civil actions which arise under the Constitution, laws, or treaties of the United States. Since, as indicated previously, there is no statutory authorization for damage claims against IRS officials, a cause of action supportable under § 1331 would have to be one which arises under the Constitution of the United States. Plaintiff has made such an *"arising under"* claim by virtue of his allegation that he was denied the due process and equal protection guaranteed to him by the fifth amendment to the Constitution.[18] Further, while the defendants' memorandum denies that plaintiff has ever alleged any fourth amendment violations (Memorandum in Support of Motion to Dismiss at 14), the court concludes that the plaintiff's complaint can be read to allege an unreasonable seizure of his property. Whether or not such fourth and

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[18]Unlike the fourteenth amendment, the fifth amendment has no independent equal protection clause. However, the Supreme Court has held that the fifth amendment's due process clause *"prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'"* *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975), quoting *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

fifth amendments claims will support an action based on 28 U.S.C. § 1331 remains to be determined.

BIVENS, BUTZ, AND DAVIS V. PASSMAN

[4,5] As indicated previously, the Supreme Court's recent decision in *Butz v. Economou*[19] determined that federal executive officials are entitled only to a qualified immunity from suits for damages arising from their unconstitutional action. The Court was careful to point out, however, that not all allegations of deprivations of constitional rights can be made the basis for damage claims. Rather, "[u]*nless the complaint states a* ***compensable claim for relief under the Federal Constitution,*** *it should not survive a motion to dismiss.*"[20] To this date, the only previously-recognized "*compensable claim for relief under the Federal Constitution*" has come from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In that case, the Supreme Court held that a violation of the fourth amendment by federal narcotics officials gave rise to a cause of action for damages consequent upon the unconstitutional conduct, and based on the general federal question jurisdiction of the federal courts. While presented with an opportunity to do so, the Court in *Butz v. Economou* specifically refused to consider which, if any, other personal interests are protected by the Constitution.[21] Resolution of plaintiff's

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[19] — U.S. —, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978).

[20] *Id.* at —, 98 S.Ct. at 2911 (emphasis added).

[21] *Id.* at —, 98 S.Ct. 2894, n.8.

constitutional claims in the pending litigation then, depends upon *Bivens* itself, as well as on the Fifth Circuit's en banc decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978).

Davis v. Passman is an extremely important case from the standpoint of the matter *sub judice* for two reasons. First, based on an analysis of how the Supreme Court had implied the fourth amendment cause of action in *Bivens*, the Fifth Circuit determined that no corresponding constitutional cause of action existed under the fifth amendment for an allegedly discriminatory dismissal of the plaintiff by her employer, a former member of Congress. Secondly, and again based on its analysis of the Supreme Court's *Bivens* decison, the Fifth Circuit also suggested that not even all alleged violations of the fourth amendment will support the cause of action which *Bivens* implied. The consequences of this analysis in *Davis* will be seen to be dispositive of the remaining matters presented in the current litigation.

The *Davis* case tested the cause of action implied in *Bivens* from two standpoints. The first approach considered the action as implied not solely on constitutional authority, but rather from the constitutional protections of the fourth amendment, buttressed by analogy to statutorily-implied causes of action where Congress had created federal rights but had provided no corresponding federal remedy. Since the right to be secure from unreasonable searches and seizures was viewed as one of the most fundamental of federal rights, and since the exclusionary rule of *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) had proven to be a less than

satisfactory remedy, the damages cause of action was viewed as necessary to effectuate the amendment. The second approach, distinguished from that found to have been used by the Supreme Court in *Bivens*, was determined to be appropriate only in situations in which the Constitution compels the existence of a damages remedy to vindicate the rights asserted.

[6] Having found that the *Bivens cause of action evolved from both constitutional and statutory bases, the Fifth Circuit tested the propriety of implication of a fifth amendment cause of action under the principles of Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), *"the Supreme Court's most comprehensive treatment of implied statutory causes of action."*[22] In that case, the Supreme Court had listed four factors to be considered in the decision whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff; (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy; (3) whether implication of the remedy would be consistent with the purpose of the right asserted; and (4) whether the cause of action implied would be one appropriate for federal law.[23]

In light of these factors, the Fifth Circuit attached a great deal of significance in *Davis v. Passman* to the fact that congressional amendments of Title VII had consistently avoided inclusion of the federal government within the Civil Rights Act's definition of the term

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[22]571 F.2d at 796.

[23]*Id.* at 797, citing *Cort v. Ash*, U.S. at 78, 95 S.Ct. 2080

"*employer.*" Consequently, in *Davis*, the court determined that no federal common law cause of action was due to be implied under the fifth amendment for alleged employment discrimination by a former Member of Congress. Similarly, under the second prong of the two-prong test for implying causes of action, the court of appeals also held that a fifth amendment cause was not constitutionally compelled. This determinination was based on the realization that not all rights included within the breadth of due process demanded federal protection through a direct cause of action.

[7] While this discussion of *Davis v. Passman* has been somewhat lengthy, the court believes that such analysis is required since that decision is viewed as dispositive of the remaining issues in the current controversy. Fortunately, in applying *Davis* to the present facts, the same considerations will be relevant to the plaintitt's asserted implied causes of action under both the fourth and fifth amendments. For the reasons which appear below, the court has concluded that such causes of action are not to be implied in the present situation. Following the approach adopted in *Davis*, a brief analysis of the current controversy in light of the relevant factors from *Cort v. Ash*, for implying causes of action is required.

[8] The first factor to be considered is whether the constitutional provisions asserted — here the fourth and fifth amendments — create an especial right in the plaintiff. The Fifth Circuit approach to this "*especial right*" requires that the injury inflicted on the plaintiff must directly infringe upon a constitutional guarantee. As pointed out in *Davis*, however, due process encompasses virtually all civil liberties embodied by the Constitution.

As such, an allegation of the denial of due process does not appear to satisfy the requirement of direct infringement of a constitutional right. Similarly, while in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*.

The second factor required to be considered toward the implication of causes of action is whether congressional activity in the field indicates an intent to allow such a remedy, or at least not to deny the remedy. It is with this factor that the strongest reasons for not implying a cause of action under either the fourth or fifth amendments in the present case are found; for here, congressional indications that no such remedy is to be allowed are clearly evident. First, the Federal Tort Claims Act specifically excludes claim against the United States if they relate to the assessment or collection of taxes.[24] Second, as further indication of congressional intent that the assessment and collection of federal taxes are to be free from judicial intervention, section 7421(a) of the Internal Revenue Code[25] prohibits any suit to restrain the assessment or collection of taxes. Finally, the fact that alternative measures for the collecting of tax assessments

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[24] 28 U.S.C. § 2680(c).

[25] 26 U.S.C.A. § 7421(a).

are provided,[26] is indicative of further congressional intent that individual liability for Internal Revenue officials is not to be implied.

The third factor required to be considered in determining whether to imply a federal common law cause of action is whether implication of such a remedy would be consistent with the purpose of the constitutional right asserted. As noted in *Davis* the breadth of the fifth amendment due process clause indicates that implication of a damage remedy from its provisions would be judicially unmanageable.[27] Further, while the breadth of the fourth amendment is more limited, the extensive statutory regulation of Internal Revenue matters (regulation which was not existent to the same degree over narcotics officials in *Bivens*) suggests that implication of a private cause of action would be inconsistent with the statutory scheme enacted by Congress.

[9] The final factor to be considered under *Cort v. Ash* is whether the implied action would be one appropriate for federal law. With regard to the fifth amendment claim, implication of a cause of action in the current case would present the same problems as those recognized by the Fifth Circuit in *Davis*. As Judge Clark pointed out in that decision, "*Because of the breadth of due process, a decision implying as action for money*

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[26] 26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency. Further, 28 U.S.C. § 1346(a)(1) grants jurisdiction to the district courts for actions against the United States for the recovery of any tax allegedly erroneously or illegally assessed or collected.

[27] 571 F.2d at 799.

damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee."[28] Similarly, although the same problems of breadth of the constitutional provision are not present with the fourth amendment claims, significant difficulties are still encountered. While the matter of abuse of IRS authority is obviously not a matter *"traditionally relegated to state law,"*[29] *the fact that extensive, specific congressional regulation of federal taxation already exists indicates that neither is the matter one appropriate for implied* federal law. Rather, it is a matter which can best be managed by further congressional refinements as these are deemed necessary.

The final consideration with regard to whether a constitutional cause of action is to be implied in this case is whether, notwithstanding congressional action or inaction, a damage action is indispensible to the effectuation of the constitutional rights asserted. Here again, the court concludes that such an action is not constitutionally compelled. In the face of assertions of protected fourth and fifth amendments claims, it is not to be forgotten that the power of Congress *"to lay and collect taxes"* is also constitutionally-mandated.[30] Pursuant to this authority, Congress has enacted one of this nation's most comprehensive legislative schemes. Adequate provision is made a part of this scheme for safeguarding of due process and equal protection, and for

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[28] *Id.* at 799-800.

[29] *Cort v. Ash, supra*, 422 U.S. at 78, 95 S.Ct. 2080.

[30] U.S. Const., amend. XVI.

assurances against unreasonable seizures. The court therefore concludes, that under the facts as here presented, the plaintiff is entitled to no more.

Accordingly, it appears that the plaintiff has not asserted a claim "*aris[ing] under the Constitution, laws, or treaties of the United States.*" Therefore, this court has no jurisdiction to entertain the merits of the litigation. Absent jurisdiction over the subject matter of plaintiff's complaint, the action must be dismissed. Judgment to this effect shall be entered by separate order.

Done this the 11th day of August, 1978.

(s) **Sam C. Pointer, Jr.**
United States District Judge
Sam C. Pointer, Jr.

APPENDIX B

(599 F.2d (1979))

Carl Michael SEIBERT, Plaintiff-Appellant, versus D.T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007.

United States Court of Appeals, Fifth Circuit. July 30, 1979.

Rehearing Denied Sept. 21, 1979.

Appeal from United States District Court, Northern District of Alabama; Sam C. Pointer, Jr., Judge.

Carl Michael Seibert, pro se.

M. Carr Ferguson, Asst. Atty. Gen., Gilbert E. Andrews, Act. Chief, Gary R. Allen, Atty., Tax Division, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

ON PETITION FOR REHEARING

(Opinion May 3, 1979, 5 Cir., 1979, 594 F.2d 423)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

On May 3, 1979, we affirmed *Seibert v. Baptist* on the basis of the United States District Judge's Memorandum of Opinoin. Relying on our *en banc* decision, *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), the lower court refused to recognize an implied private cause of action for damages under the due process clause of the fifth amendment. In *Davis v. Passman*, ____ U.S. ____, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979), a ruling announced on June 5, 1979, however, the United States Supreme Court reversed our *en banc* decision and found that a cause of action as well as a damage remedy could be implied under the due process clause of the fifth amendment. We therefore reverse and remand to the district court.

APPENDIX C

(446 U.S. 918, 64 L.Ed.2d 271, 48 L.W. 3651)

Carl Michael SEIBERT, petitioner, v. D.T. BAPTIST, District Director of Internal Revenue Service, et al. No. 79-1309.

Rehearing Denied June 16, 1980.

See 447 U.S. 930, 100 S.Ct. 3030.

Facts and opinion, 594 F.2d 423; 599 F.2d 743.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

April 28, 1980.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV 77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

ORDER

In accordance with a contemporaneously entered memorandum opinion, it is ORDERED that:

1. Plaintiff's motion to add party is DENIED.

2. Plaintiff's motion for leave to file amendment to complaint is DENIED. Plaintiff is granted leave to file an amendment as provided in the memorandum opinion entered contemporaneously herewith.

3. Plaintiff's motion for summary judgment is DENIED.

DONE and ORDERED this 4th day of August, 1981.

(s) ROBERT B. PROPST
UNITED STATED DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV 77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause comes on to be heard on plaintiff's Motion to Add Party, plaintiff's Motion for Leave to File Amendment to Complaint, and plaintiff's Motion for Summary Judgment. Defendants, in response to plaintiff's Motion for Summary Judgment, have attempted to renew a Motion for Summary Judgment which the court overruled October 20, 1980. The court notes that there has been no pleading to that effect. The court is of the opinion that defendants cannot renew their Motion for Summary Judgment in a responsive brief, and has concluded that

the matter is not properly before the court.

At the outset the court is of the opinion that a recitation of the history of this cause is needed to place the case in a proper perspective. Plaintiff filed a *pro se* complaint against the District Director of the Internal Revenue Service, four officials of the IRS, two Huntsville Policemen, and a Madison County Circuit Judge. The facts surrounding this cause are set out in Judge Pointer's Memorandum of Opinion dated August 11, 1978. Judge Pointer, in an exhaustive review of plaintiff's complaint, granted the defendants' motion to dismiss, which Judge Pointer had treated as a motion for summary judgment under Rule 56, Fed. R. Civ. P. Judge Pointer's final conclusion was that the court lacked jurisdiction to entertain the merits of the litigation, and that the action must, therefore be dismissed.

Judge Pointer divided his analysis of jurisdiction into asserted statutory and constitutional grounds. He concluded that the asserted statutory bases of jurisdiction were without merit, with little accompanying discussion. With a great deal more discussion Judge Pointer likewise concluded that the asserted constitutional bases of jurisdiction, the fourth amendment and the fifth amendment claim, that the seizure in this case was not so unreasonable as the seizure involved in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and, thus, the injury inflicted on the plaintiff did not directly infringe upon any fourth amendment guarantee, that congressional activity in the field indicated an intent to deny any remedy against Internal Revenue Service officials for their actions to collect taxes, that the extensive statutory regulation of

Internal Revenue matters suggested than an implication of a private cause of action would be inconsistent with the statutory scheme enacted by Congress, and that an implied cause of action based upon the fourth amendment in this case would be inappropriate in view of the fact that extensive, specific congressional regulation of federal taxation already exists.

Judge Pointer held, as to the fifth amendment claim, that an allegation of the denial of due process did not appear to satisfy the requirement of direct infringement of a constitutional right, that, again, the congressional activity in the field indicated an intent to deny any remedy against IRS officials for their actions in assessing and collecting taxes, that implication of a damage remedy from the provisions of the fifth amendment due process clause would be judicially unmanageable, and that implication of a cause of action based

upon the fifth amendment in the current case would extend an action for damages to any constitutional guarantee.

From Judge Pointer's decision, plaintiff appealed. The Fifth Circuit affirmed, per curiam, on the basis of Judge Pointer's memorandum opinion, and appended a copy of that opinion to its decision. *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979).

The gist of Judge Pointer's decision, as this court reads it, was to hold that, while the Supreme Court had recognized that a person might have a cause of action based upon the fourth amendment (*Bivens*, *supra*), the same factors which led the Supreme Court in *Bivens* to hold that a cause of action might be based directly upon the fourth amendment were not present in this case; and, thus, plaintiff could not assert a cause of action based directly upon the fourth amendment. Further,

Judge Pointer held, in essence, that the Supreme Court had not, to that date, held that an implied cause of action might be based directly upon the Fifth amendment, that the Fifth Circuit had extensively addressed the question in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), and had answered in the negative, and that, for similar reasons the Fifth Circuit had held in *Passman* that an implied cause of action could not be based directly upon the fifth amendment, the plaintiff in the current case could not base an implied cause of action directly upon the fifth amendment.

On June 5, 1979, the Supreme Court reversed the Fifth Circuit's *en banc* decision in *Passman* (*Davis v. Passman*, 442 U.S. 228 (1979)) and held that an implied cause of action could be directly based upon the fifth amendment. Thus, on Petition for Rehearing

in *Seibert v. Baptist*, the Fifth Circuit reversed and remanded to the district court.

The case was then reassigned from Judge Pointer to this judge. Plaintiff had, by that time, engaged legal counsel, who filed an Amended and Redrafted Complaint, naming five officers of the IRS and Steven M. Beshears, who is alleged to have been a paid informer of the Huntsville Police Department. In his Amended and Redrafted Complaint, plaintiff alleged everything he had alleged in his original complaints before Judge Pointer, resurrecting claims previously found insufficient by Judge Pointer in his August 11, 1978 memorandum opinion, and asserting the additional claim against Steven Beshears. Plaintiff subsequently filed a motion to dismiss one of the IRS officials, which the court granted. What remained, then, was a blanket

complaint against four IRS officials and Steven Beshears.

At about the same time plaintiff had engaged legal counsel, new Justice Department counsel entered the case, and moved for summary judgment on the basis of absolute immunity. That motion was denied by the court October 20, 1980. As can be readily seen, with the exception of the parties, new players had entered the drama subsequent to the Fifth Circuit's remand: a new judge, new counsel for plaintiff, and new counsel for the federal defendants.

To further complicate matters, plaintiff and his newly engaged counsel had irreconcilable differences of opinion as to methods of proceeding in the prosecution of plaintiff's case. Counsel's Motion to Allow Withdrawal of Counsel was granted after no objection was received from plaintiff within 10 days after

said motion was filed. Plaintiff is, thus, once again, *pro se*.

The court has recited the history of this case to place the case in proper perspective. The court is of the opinion that this cause is to proceed, if at all, only on plaintiff's claimed implied cause of action based directly upon the fifth amendment. While the Fifth Circuit on rehearing reversed and remanded the cause to this court, Judge Pointer's analysis of plaintiff's claims, other than his analysis of the implied cause of action based upon the fifth amendment, is accurate. Plaintiff's claims, other than his claim based directly upon the fifth amendment, cannot be maintained.

Thus, the case is in this posture: plaintiff claims that the federal officials, acting in their individual capacities, denied plaintiff due process of law; jurisdiction is based

on 28 U.S.C. § 1331 and the fifth amendment. The record indicates that Steven Beshears has never been served a complaint. All other claims are insufficient.

The court will now address the pending motions.

MOTION TO ADD PARTY

The motion purports to add Larry R. Hyatt, who was, at the time of the acts made the basis of plaintiff's fifth amendment claim, Group Manager of Special Agents for Huntsville and Birmingham, under Rule 21, Fed. R. Civ. P. Since the applicable statute of limitations has run, however, the same factors in determining whether an amendment to a complaint will be allowed to "relate back" to a timely original or amended complaint must be determined by the court in the motion under consideration. See generally 7 C. *Wright & A. Miller*, stated as follows:

> (1) 'the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurence set forth or attempted to be set forth in the original pleading'; (2) 'the party to be brought in by amendment . . . has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits'; and (3) 'the party to be brought in by amendment . . . knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.' . . . And the defendant received notice of the action 'within the period provided by law for commencing the action against him.'

Kirk v. Cronvich, 629 F.2d 404, 407 (5th Cir. 1980).

At the outset, the court emphasizes that because of the lengthy and somewhat muddled history of this case, and because this case has already been on appeal once, the court has analyzed plaintiff's claim and plaintiff's motion in the most liberal posture. The court has construed any doubts in plaintiff's favor.

The first factor is arguably met. Even though no new claims are asserted, it is obvious from reading the depositions filed that Hyatt's involvement was different than the involvement of defendants already named. Nevertheless, the motion, as drafted, simply seeks to add Hyatt. The second factor is met by virtue of the identity of interest between Hyatt and the other parties already named as defendants in the suit. *Kirk, supra*, at 408 n.4. Hyatt made a recommendation, or concurred in a recommendation, that plaintiff's tax year be terminated. Thus, Hyatt was so closely related in his business operations or other activities with the other parties that the institution of the action against one served to provide notice of the litigation to Hyatt under the idea of interest theory. Moreover, some defendants named in the original complaint were under the supervision of Hyatt, much like

the defendants originally named in *Kirk* were under the supervision of the Sheriff sought to be added as a party. Thus, the court will make the same assumption that the Fifth Circuit made in *Kirk*, namely that the special agents previously named brought the matter to the attention of Hyatt, who was in charge of the department.

While Hyatt claims he would be prejudiced by being added at this late date, the court notes that Hyatt is represented by the same counsel that represents the other defendants, again a similar factor the Fifth Circuit noted in *Kirk*. When Hyatt's agents and their attorney learned of the suit against them, "they should have taken steps to investigate the claim, including collecting and preserving evidence against any forseeable eventuality. Therefore, Hyatt cannot claim that he has been prejudiced through the loss of evidence of by undue surprise." *Kirk*, *supra*, at 408.

Notwithstanding that two of the factors for relation back are arguably met in the case *sub judice*, the other two factors which were met in *Kirk* are not met in the case *sub judice*. First there is absolutely nothing to indicate that Hyatt "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." This case is unlike the situation presented in *Kirk*. There, the party sought to be added was, at all relevant times, the Sheriff of Jefferson Parish. It was undisputed that the sheriff was the person to be served with the conplaint and summons. Counsel conceded that the sheriff and not the sheriff's office was the proper party. The sheriff, therefore, knew or should have known that he was the party who should have been sued. In the case *sub judice*, there are no comparable facts to those present in *Kirk*.

Neither plaintiff's *pro se* complaint, nor the amended and redrafted complaint filed by plaintiff's counsel upon his entry into the case contains any allegation describing Hyatt's position or sufficiently placing Hyatt on notice that plaintiff intended to sue Hyatt. The court would simply have to read plaintiff's *pro se* complaint with far greater reach than even *pro se* complaints are entitled to reach the conclusion that Hyatt knew or should have known that, but for a mistake of his identity, he is the party who should have been sued.

On the contrary, the complaint in this case shows that the agents working under Hyatt and Hyatt's supervisors were named as defendants. Logic compels the conclusion that Hyatt's identify would be as easily discovered as those defendants actually named. There is nothing in the record to indicate that Hyatt actively sought to secrete himself or his identity from

plaintiff's knowledge. In fact, Hyatt's deposition testimony affirmatively shows that the first he knew about the case was in December, 1980. Instead of knowing that he should have been sued, or would have been sued had plaintiff not been mistaken as to his identity, Hyatt could well have concluded that plaintiff had made a conscious decision not to bring the action against him. There was no mistake as to Hyatt's identity. There may have been an oversight, or inadvertance, or a lack of diligence in investigating plaintiff's claim, but the court finds that such is not excusable. The mistaken identity factor being absent would, of itself, require that plaintiff's motion be denied.

Second, the complaint against the IRS agents was not filed within one year of accrual of the claim which at the latest accrued against Hyatt July 10, 1973, one year after Hyatt either

recommended or concurred in a recommendation to terminate plaintiff's taxable year. The depositions show that the recommendation was the only contact Hyatt had with plaintiff's tax problems. The complaint was not filed in this case until July 11, 1977, and the earliest service date on any one of the federal officials was July 20, 1977. Thus, there is no way Hyatt received notice of the action within the period provided by law for commencing the action against him. *Kirk, supra*, at 407.

In view of the fact that the factors for relation back are not present, plaintiff's Motion to Add Party is due to be denied.

MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

Plaintiff seeks to amend his complaint to allege a cause of action against defendant Baptist under 5 U.S.C. § 552(a)(4)(A)(B) for aiding, sanctioning, ordering or otherwise

directing the wilful secretion or destruction of information. The information allegedly so secreted or destroyed was Seibert's file, apparently the file maintained in the district office.

Even a cursory reading of the statute indicates that it provides no cause of action in damages against one who fails to disclose information. Rather the statutory scheme of the Freedom of Information Act is to provide a procedure for individuals to obtain information from government agencies.

When an individual feels that information has been wrongfully withheld, the statute grants a federal district court, upon complaint, jurisdiction to enjoin the subject agency from withholding the records sought and to order the production of any records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(b)(1976). It does not provide for a direct

cause of action by the complainant for damages. Thus, plaintiff's motion, to the extent it seeks to amend this complaint to include a cause of action against defendant Baptist for wilfully secreting information is due to be dismissed. The court will, however, grant plaintiff leave to file a proposed amendment for proper relief provided by the Freedom of Information Act. The court will hold plaintiff's motion in abeyance until plaintiff files a proposed amendment.

MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that defendants' actions have deprived him of due process as a matter of law and that he is, therefore, entitled to judgment as a matter of law under Rule 56, Fed. R. Civ. P. In response to plaintiff's motion, defendants have filed a brief asserting that they are entitled to summary judgment on

the basis of immunity and the statute of limitations. As the court has previously noted, defendants have not filed a second motion for summary judgment, nor have they filed a motion to renew their initial motion for summary judgment. The court is thus, of the opinion that there are not cross motions for summary judgment.

While there is authority that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56, *Bank of Lexington v. Jack Adams Aircraft Sales*, 416 F. Supp. 17, 19 (N.D. Miss. 1976), 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2720, pp. 467-471 (1972), the court is reluctant to grant summary judgment, if warranted, to defendants absent a formal motion, especially when the issue of the statute of limitations has not been addressed

in any previous proceeding. Judge Pointer never addressed that issue; and it has not been addressed by this judge. Defendants relied solely on absolute immunity in the motion for summary judgment filed in September, 1980.

Nevertheless, even though defendants have not filed a formal cross-motion for summary judgment, the court is of the opinion that the immunity *vel non* of defendants and the statute of limitations are proper issues for consideration, if not determination, in determining whether plaintiff is entitled to judgment as a matter of law.

The court is, quite frankly, surprised that this case could be pending at this point in time without a resolution of the statute of limitations issue; and the court is of the opinion that the issue may well be determinative of the case. Plaintiff's complaint is essentially that the defendants abused their

authority in terminating plaintiff's taxable period and that they did not follow the prescribed procedure to make jeopardy assessments of income tax deficiency; by doing so, the federal defendants are alleged to have violated plaintiff's right to due process.

These acts occurred between July, 1972 and August, 1974. The question then arises as to what statute of limitations is applicable. Obviously, there is no statute of limitations provided by federal common law. The court must, therefore, look to state law to determine the most analagous statute of limitations. The court is of the opinion that Alabama's one-year statute of limitations, Ala. Code § 6-2-39(5), "Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . . ," is the appropriate statute of limitations.

Plaintiff makes two contentions. The first is that these federal defendants were involved in a conspiracy to deprive plaintiff of his due process rights and that the conspiracy did not end until January 17, 1977 when the United States Tax Court entered an order in plaintiff's favor. The deposition of defendant Baptist, however, indicates that any involvement by his office (and all these defendants worked under Baptist) ended in August, 1974 upon issuance of a notice of deficiency. From that point forward, the case was handled entirely by the Internal Revenue's District Counsel, whose duties included trial work in the Tax Court. There is no allegation of a conspiracy existing between Baptist and his employees and the IRS's District Counsel Thus, any conspiracy between the federal defendants named terminated on August 7, 1974. If the one-year statute of limitations is applicabl

it is clear that the suit, being filed on July 11, 1977, was filed after the statute had run.

Plaintiff's second contention is that the 10-year statute of limitations, Ala. Code § 6-2-33(3), "Motions and other actions against sheriffs, coroners, constables and other public officers for nonfeasance, misfeasance or malfeasance in office," is the applicable statute of limitations. Plaintiff cites no cases showing that the 10-year statute would be applicable to federal Internal Revenue Service officers. The court has found no cases which would lead to that conclusion, even by analogy. The court is the opinion that the 10-year statute of limitations is applicable in cases where the public official is charged with conversion or misappropriation of funds entrusted to him, not where the public official is charged with violating a person's constitutional rights. The Fifth Circuit has specifically held that

in the analagous 42 U.S.C. § 1983 situation the Alabama one-year statute of limitations is applicable. *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980). Thus, it appears that, upon appropriate motion, this cause may be due to be dismissed based upon the statute of limitations.

Turning now to the immunity *vel non* of the federal defendants, the court is now of the opinion that defendants Baptist and Magill may be absolutely immune from liability for their actions. Their depositions indicate that they were "responsible for the decision to initiate or continue a proceeding subject to agency adjudication." *Butz v. Economou*, 438 U.S. 478, 516 (1978); *Stankevitz v. IRS, et al.*, No. 79-4214 (9th Cir. Jan. 12, 1981); *Dedman v. Vowell*, No. J-C-80-103 (E.D. Ark. Jan. 19, 1981). Baptist was District Director of the IRS. Magill was Baptist's first

assistant and was Acting Director when Baptist was out of the office. The depositions on file indicate that when the District Director or the Acting District Director decide to issue a jeopardy assessment or a notice of deficiency, he did so exercising his independent judgment on whether such action was warranted. The decision to issue the jeopardy assessment and the notice of deficiency in this case were clearly within the decision-making process of defendants Baptist and Magill, and were, therefore, akin to the prosecutorial decisionmaking process recognized absolutely immune in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and analogized to Agriculture Department officials in *Butz v. Economou*, *supra*.

As to the other two federal officials named as defendants, Lee Willingham is alleged to have wrongfully seized plaintiff's

property, and Frank McCammon is alleged to have violated plaintiff's right to equal protection by refusing to investigate Steven Beshears. It would appear that the only claim alleged against Willingham, the wrongful seizure of property, was laid to rest by Judge Pointer's previous decision holding that plaintiff had no implied cause of action on the fourth amendment because plaintiff had not alleged conduct similar to that present in *Bivens*. The court again points out that the Fifth Circuit did not withdraw its initial affirmance in *Seibert v. Baptist;* it is the court's opinion that the only effect of the Fifth Circuit's order on rehearing was to reverse and remand as to the fifth amendment claim. In any event, on proper motion, it appears that the claim against Willingham may be due to be dismissed.

The court has carefully considered the

claim alleged against defendant McCammon to determine whether a cognizable cause of action is stated. McCammon's affidavit and deposition indicate that McCammon has had very minimal contact with plaintiff. Plaintiff attempted to present information concerning Steven Beshears to McCammon. McCammon states that plaintiff presented no documentary evidence to support his allegations against Beshears, that the information plaintiff presented which was tax related was recorded, and that an investigation, in McCammon's opinion, was not warranted. The one meeting between plaintiff and McCammon is McCammon's only contact with the case. For refusing to investigate Steven Beshears, McCammon is alleged to have in some manner violated plaintiff's constitutional right to equal protection. The allegations simply fail to state a claim against McCammon. On proper motion, it would appear that the

claim against McCammon is due to be dismissed.

As can be readily ascertained from the foregoing analysis, plaintiff is not entitled to judgment as a matter of law. There are serious questions as to whether plaintiff is even entitled to proceed with his claims. The court is of the opinion that a combination of events have thrown this cause into a morass. Even though the case has been pending for more than four years, very few substantive issues have been addressed. As the court has noted, the statute of limitations issue has yet to be addressed. The immunity issue was addressed in October, 1980, but the court has indicated that it may have well reached the wrong conclusion at that time. And finally, all though the Fifth Circuit reversed and remanded on the fifth amendment claims, it did not hold that plaintiff had asserted a cause of action against every defendant. Even

though plaintiff's former legal counsel filed an amended and redrafted complaint, defendants have not tested the sufficiency of plaintiff's claims based upon the fifth amendment.

An order denying plaintiff's Motion to Add Party and Motion for Summary Judgment and directing plaintiff to file a proposed amendment based upon theFreedom of Information Act will be contemporaneously entered with this Memorandum Opinion.

DONE this 4th day of August, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the foregoing Petition for Writ of Certiorari were with date deposited with the United States Postal Service, postage first class prepaid, and properly addressed to the Honorable Rex Lee, Solicitor General, 10th Street and Pennsylvania Avenue, N.W., Room 5614, Department of Justice, Washington D.C. 20530. This the 9th day of November, 1983.

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By: /s/ J. Stephen Salter

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